

Attachment 1:
Policy Statement of the California Regional Water Quality Control Board,
San Diego Region
In Opposition to the Request for Stay
Of the
Orange County Municipal Storm Water Permit Order No. R9-2002-0001
June 27, 2002

Policy Statement of the San Diego Regional Water Quality Control Board

The San Diego Regional Water Quality Control Board (RWQCB) strongly opposes the stay requested by the City of Aliso Viejo (Aliso Viejo), the City of Mission Viejo (Mission Viejo) and the Golden Rain Foundation, a.k.a. Leisure World (Foundation), hereafter referred to as Stay Proponents. The Stay Proponents carry the substantial burden of providing proof (1) of substantial harm to the Stay Proponents if a stay is not granted, (2) of a lack of substantial harm to the other interested parties or to the public interest if the stay is granted, and (3) that substantial questions of fact or law exist regarding the underlying permit (Cal. Code Regs., tit. 23, §2053). Collectively and individually the stay requests lack merit and fail to satisfy these criteria.

Background

The RWQCB unanimously adopted the Orange County municipal separate storm sewer system permit (MS4 Permit) on February 13, 2002 after considering extensive public comment. The Permit was the third iteration of the Orange County MS4 permit within a twelve year period, and like all successive MS4 permits, it incorporates incremental Best Management Practice (BMP) provisions to reflect the Clean Water Act requirements to “reduce the discharge of pollutants to the maximum extent practicable” and to “effectively prohibit non-stormwater discharges into the storm sewers.” (33 U.S.C. § 1342(p)(3)). Previous permits (Order No. 90-38 and Order No. 96-03) required the development and implementation of a Drainage Area Management Plan (DAMP) that required the Copermittees to implement programs, including inspections and site specific BMPs, to reduce pollutants in urban runoff from commercial, residential, industrial, and construction sites and areas to the Maximum Extent Practicable (MEP). The permit findings and the Fact Sheet/Technical Report (Fact Sheet) recognize that

prior efforts implemented by the MS4 dischargers under the DAMP have been largely ineffective, resulting in the discharge of polluted urban runoff into the region's waters. This underlying fact is most profoundly illustrated in the ongoing bacteria and toxicity impacts of urban runoff in the Aliso Creek watershed, the site of a RWQCB Cleanup and Abatement Order and 13225 Technical Report Directive regarding elevated bacteria levels in MS4 discharges into Aliso Creek.

Stay Proponents Will Not Sustain Substantial Harm If A Stay Is Denied

The requirements in the permit challenged by the Stay Proponents are essentially identical to those required in the San Diego permit. These requirements, including the inventory, prioritization, and inspection of construction and industrial sites, are being successfully complied with by the San Diego Copermittees. It is worth noting that the San Diego Copermittees successfully completed a transition in one year from a first term permit issued in 1990 to a third term permit issued in 2001. The San Diego Copermittee's success demonstrates that the Orange County MS4 permit requirements can be met without substantial harm.

While the Stay Proponents cite increased costs as evidence of substantial harm if a stay is not granted, they do not, adequately provide any evidence that these costs will be incurred during the period of the petition review. The industrial and construction inspection requirements cited by the Stay Proponents in their discussion of potentially harmful costs do not become effective until February 13, 2003. Moreover, with respect to industrial facilities, the inspections do not have to be completed until February 2004. These dates fall well after the anticipated completion of the petition review.

The Foundation's stay request is founded on the premise that it will incur substantial harm if the City of Laguna Woods is required to implement two programs with incompatible

schedules to satisfy permit requirements for the Santa Ana and San Diego permits, resulting in increased taxes and wasted public funds. The Foundation, however, fails to provide proof that these requirements and implementation schedules are incompatible during the petition review period. Nor has the Foundation produced proof that it will be assessed increased taxes by Laguna Woods. More to the point, the Foundation has failed to consider that it is practicable for the City to comply citywide with the more stringent or earlier permit requirements and thus comply with both permits under a single program, thereby avoiding or mitigating the alleged harm.

Aliso Viejo seems to assert that the erroneous fiscal assumptions made by the City during its incorporation should constitute a constraint upon the permitting authority of the RWQCB and that it will be harmed unless a stay is granted. Compliance during the SWRCB review is fiscally and practicably achievable, as demonstrated by the San Diego Copermittees; especially as most of the requirements for which the Stay Proponents seek a stay are not likely to become effective until after the petition review.

There is Substantial Harm to the Public Interest if the Stay is Granted

The Stay Proponents have failed to demonstrate that continued harm to interested persons and the public interest will not occur if a stay is granted. The Stay Proponents fail to allege facts or produce proof challenging the findings upon which the permit is based, which describe the harm and potential harm to the public interest in a clean and wholesome environment resulting from the impact of polluted urban runoff upon water quality and beneficial uses. Furthermore, the Stay Proponents have not challenged the RWQCB's assessment of the adverse economic and social impacts resulting from the discharge of polluted urban runoff in the San Diego Region discussed in detail in section III of the Fact Sheet. Specifically, the Stay

Proponents do not refute the serious water quality impacts in southern Orange County documented in the permit findings about (a) water degradation resulting from pathogens, sediment, fertilizers, pesticides, heavy metals and petroleum products, (b) increases in pollutant load, volume, and velocity of runoff resulting from urban runoff, (c) increase of water quality degradation correlated with increased impervious surfaces, (d) urban runoff as a human health threat, (e) urban runoff impairment of beneficial uses, and (f) fundamental changes needed to existing policies and practices in urban development. Moreover, although Aliso Viejo objects to the Finding 26 (Toxicity), it does not refute the factual nature of the Finding that urban runoff discharges from MS4s often contain pollutants that cause toxicity.

Although the Stay Proponents assert that continued implementation of the DAMP will prevent substantial harm to the public interest if a stay is granted, they have not provided facts or proof that continued implementation of the DAMP will prevent the continued impairment of beneficial uses and their concomitant economic and social impacts during the petition review. As previously indicated, the programs implemented under the DAMP have been largely ineffective in protecting water quality. The permit findings and assessment of the water quality, social, and economic impacts resulting from discharges of polluted urban runoff lay at the heart of the question of substantial harm to the public interest if the stay is granted.

In addition, granting a stay will allow additional major development projects in southern Orange County to be approved without meeting the Standard Urban Stormwater Mitigation Plans (SUSMP) provisions in the Orange County MS4 Permit and already upheld by the State Water Resources Control Board (SWRCB) in two previous Orders. If a stay is granted, the incremental storm water improvements that would be achieved through timely implementation of SUSMPs will be permanently lost for those projects and associated receiving waters.

There Are Not Substantial Questions of Law Or Fact Regarding The Disputed Actions.

All of the permit requirements are within the broad legal authority of Clean Water Act section 402(p)(3)(B)(iii) that allows the RWQCB to identify measures and controls to reduce pollutants to the maximum extent practicable. Furthermore, nearly all of the permit directives challenged by the Stay Proponents existed in general terms under the previous permits and the DAMP. In addition, the requirements the Stay Proponents seek to have stayed are essentially identical with those in the San Diego permit upheld by the SWRCB in Order WQ 2001-15 during its review of that permit. With respect to Mission Viejo's request for a stay of the SUSMP requirements of the permit, the SWRCB has now addressed this matter in two prior Orders with which the permit is in full conformance. In addition, many of these requirements have been incorporated in MS4 permits elsewhere in the region, state, and nation. To the extent that these elements are within the broad legal authority of the Clean Water Act, were previously required, have been upheld in prior SWRCB Orders, or have been incorporated elsewhere, there is not a substantial question of law or fact to justify granting the stay request.

With respect to Aliso Viejo's stay request for Finding 26, Aliso Viejo's objection concerns provisions of San Diego Water Quality Control Plan (Basin Plan) rather than with the requirements contained in the MS4 permit. Furthermore, the City's allegation of anticipated inability to comply is based on the nature of Aliso Viejo's discharges, rather than a defective permit. Moreover, Aliso Viejo erroneously applies the MEP standard to a Finding of fact regarding compliance with water quality objectives of the Basin Plan.

Conclusion

For all of the foregoing reasons, the RWQCB strongly recommends that the State Board deny the stay requests.